IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 122

JULIUS FISHER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Your petitioner, Julius Fisher, respectfully requests this Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia (April 23, 1945; rehearing denied May 7, 1945) affirming a judgment of the United States District Court for the District of Columbia sentencing him to be electrocuted following his conviction of murder in the first degree. The date of his execution is now set for June 29, 1945.

Basis of Jurisdiction

Jurisdiction is invoked under Judicial Code Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C., sec. 347).

Statute Involved

The statute involved is the Act of Congress March 3, 1901, c. 854, secs. 798 and 800, 31 Stat. 1321 (D. C. Code, 1940, title 22, secs. 2401 and 2403, which are set out in full in the Appendix. The relevant portions are:

> Sec. 798. "Whoever, being of sound memory and discretion, kills another purposely * * * of deliberate and premeditated malice * * * is guilty of murder in the first degree."
>
> Sec. 800. "Whoever, with malice aforethought * * * kills another, is guilty of murder in the second degree."

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia which has not been officially reported, appears in the Record at pp. 115-118.

Questions Presented

Under the Act of Congress March 3, 1901, c. 854, above cited:

(1) Are psychiatric aggressive tendencies, low emotional response and borderline mental deficiency which are insufficient to justify a finding of not guilty by reason of insanity, nevertheless to be considered by the jury in determining whether the accused is guilty of murder in the first degree or murder in the second degree?

(2) Are the issues of deliberation and premeditation raised by an indictment for murder in the first degree to be determined by the standard of a reasonable man, or by consideration of the personality of the individual accused of the crime?

Salient Facts

Petitioner, a Negro janitor at the Washington Cathedral in the District of Columbia, allegedly killed a white woman, the Librarian, March 1, 1944 in the Library building on the Cathedral grounds in a dispute arising over the manner of his work. Petitioner claimed the killing was not premeditated but committed under impulse of an epithet addressed to him by the Librarian and of her screaming (R. 59).

Psychiatrists testified both for the defense and for the Government: for the defense, that petitioner had the mental age of a child 11 years 4 months, an I. Q. of 76, which is on the borderline of mental deficiency; that his eyes were mongoloid, his reflexes hyperactive; that he exhibited a definite flattening of emotional response, and was a psycopathic personality of the predominantly aggressive type of behaviour, purely of an impulsive nature (R. 89-90). The Government psychiatrist gave his opinion that petitioner was not set off by automatic impulses, might easily have acted under anger without being mentally diseased, was probably very mad, and that there was provocation (R. 92-95).

The District Court refused to charge the jury as requested by petitioner in his request No. 6, to which petitioner duly noted an exception:

> "The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case" (R. 102).

The District Court charged the jury it might find the defendant not guilty by reason of insanity if at the time of the killing mental disease had made him "incapable to understand the nature and quality of his act, to know that it is wrong, to refrain from doing the wrongful act"; or if a diseased condition of his mind had so far destroyed his will that his actions were beyond control of his will, although he might then have understood the nature of his acts and been conscious that they were wrong. The Court gave no instruction that once having found the defendant of sound memory and discretion according to the tests outlined above, the jury might still consider the evidence of defendant's mental condition on the issue whether the killing was with deliberate and premeditated malice, to determine whether the crime was murder in the first degree, murder in the second degree, or manslaughter (R. 103-112).

In affirming the judgment, the Court of Appeals stated *inter alia*:

> "With respect to the issue of deliberation the psychiatric testimony went no further than to say that appellant was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men. But it is obvious that brutal murders are not committed by normal people. To give an instruction like the above is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes. (3)
>
> Footnote: "(3) 'The rule suggested by appellant would become a refuge for ill-tempered, irresponsible citizens; it would put a premium upon lack of self-control and would penalize the reasonable man, because of the restraint which he practices in his dealings with

his fellows.' Hart v. United States, 76 U. S. App. D. C. 193, 195, 130 F. (2d) 456, 458 (1942)." (R. 117).

Petitioner applied for rehearing on the ground that the appellate court had confused the test of insanity justifying complete acquittal with the issue of a mental condition to be considered in determining whether the degree of crime was murder in the first degree or murder in the second degree, and that the rule established by the trial court and affirmed by the appellate court deprived petitioner of his right to have the jury consider the essential elements of his individual mental condition and personality in determining the degree of his guilt (R. 119-120). The petition was denied without an opinion (R. 120).

Reasons Relied On for Allowance of the Writ

1. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction of an Act of Congress which has not been but should be decided by this Court. It is petitioner's contention that the Court of Appeals failed to recognize and give effect to the distinction made by Congress between murder in the first degree and murder in the second degree.

2. The said Court erred in holding that a defective mental condition, insufficient to sustain an acquittal on the ground of insanity, may not be considered in determining the degree of crime, between murder in the first degree and murder in the second degree, thereby depriving this defendant on trial for his life of the benefit of relevant and perhaps decisive evidence in his favor.

In support of the foregoing grounds of application your petitioner submits the accompanying brief setting forth in detail the precise facts and arguments applicable thereto.

Wherefore he prays that this Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

All of which is herewith respectfully submitted this 9th day of June, 1945.

JULIUS FISHER,
Petitioner,
By CHARLES H. HOUSTON,
615 F Street, Northwest,
Washington 4, D. C.,
Counsel for Petitioner.

IN THE

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BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia which is not yet officially reported appears in the Record at pp. 115-118.

Grounds for Jurisdiction

Jurisdiction is invoked under Judicial Code section 240, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. sec. 347). A concise statement of the grounds on which jurisdiction is invoked is contained in the Petition, reference to which is hereby respectfully made.

The decision of the Court of Appeals was entered April 23, 1945; petition for rehearing was denied May 7, 1945.

Salient Facts

Petitioner, a Negro janitor at the Washington Cathedral, was convicted of murder in the first degree for killing the Librarian, Catherine Cooper Reardon, March 1, 1944, in the Library building on the Cathedral grounds. There were no witnesses; the two parties were in the building alone.

The library building is built on a slope, with the front vestibule on street level. Off the vestibule is a small reading room. The room and librarian's desk are on the floor below. The rear windows of the stack room open out on the down slope. The building is small.

About a week before the killing the Librarian had complained to the verger of the Cathedral about dirt under her desk. The verger told petitioner to take care of the matter but not to mention it to the Librarian as she was peculiar. Petitioner received the complaint with no show of resentment (R. 13).

On the morning of the killing petitioner was dusting books in the stacks, near the Librarian's desk. The Librarian complained of dust on her desk; petitioner protested he had dusted and always tried to do his work. The Librarian countered with, "You black nigger, you should be able to keep this place clean. That's what they are paying you for". He lost control of himself and impulsively smacked her. She ran screaming back toward the windows in the rear of the stack room (R. 59).

Petitioner ran out the room up the steps to leave the building, but as he ran up the steps the screaming kept scaring him. When he got to the top of the landing, he ran in the reading room which had a fire place, got a stick of firewood, ran back downstairs and struck her with it. He said he was not trying to kill her, but just trying to stop the noise.

The stick broke. He began choking her until she stopped hollering. He then dragged her by the hands out of the stack room to a small lavatory off the stack room where he left her while he got toilet paper to go back and wipe up the blood stains on the floor. While he was wiping up the blood stains she started hollering again. He came back, took his knife out and stuck her in the throat. The knife did not penetrate the muscles, merely made a superficial wound. He said his idea was just to stop her from hollering; that was all he could think about.

After that she stopped hollering. He put her body in a steam pipe tunnel, and left the grounds (R. 60).

The chief evidence for the prosecution was police testimony concerning an alleged confession petitioner made after his arrest. In this confession the police have petitioner saying when he began strangling the deceased: "If I don't kill you it will be the last of me", and that the last thing he did before he left her was to stick her in the neck with his knife to make sure she was dead. Petitioner denied the police version of the confession.

Psychiatrists testified on both sides: for the defense, that petitioner's mental age was that of a child 11 years 4 months old; his I. Q. was 76, which is on the borderline of mental deficiency; his eyes were mongoloid and reflexes hyperactive; that he exhibited a definite flattening of emotional response, and was a psycopathic personality of the predominantly aggresive type of behaviour, purely of an impulsive nature. For the prosecution: that petitioner was not set off by automatic impulses, might easily have acted under anger without being mentally diseased, was probably very mad, and there was provocation. At the trial petitioner's counsel made no serious effort to deny the killing or to exculpate petitioner from all blame. He concentrated on resisting a conviction of murder in the first degree.

The trial court refused to give the jury petitioner's requested prayer No. 6, to which petitioner duly excepted:

> "The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case".

In its charge to the jury the trial court covered the questions of premeditation and deliberation in the following language:

> "Then there is the element of premeditation. That is, giving thought, before acting, to the idea of taking a human life and reaching a definite decision to kill. In short, premeditation is the formation of a specific intent to kill.
>
> "Deliberation, that term of which you have heard much in the arguments and one of the elements of murder in the first degree, is consideration and reflection upon the preconceived design to kill; turning it over in the mind; giving it second thought.
>
> "Although formation of a design to kill may be instantaneous, as quick as thought itself, the mental process of deliberating upon such a design does require that an appreciable time elapse between formation of the design and the fatal act within which there is, in fact deliberation.
>
> "The law prescribes no particular period of time. It necessarily varies according to the peculiar circumstances of each case. Consideration of a matter may continue over a prolonged period—hours, days, or even longer. Then again, it may cover but a brief span of minutes. If one forming an intent to kill does not act instantly, but pauses and actually gives second thought and consideration to the intended act, he has, in fact

deliberated. It is the fact of deliberation that is important, rather than the length of time it may have continued."

"If, therefore, one tempted to take human life, gives thought to such an idea and forms a specific intent to kill, then reflect upon that purpose and holds to it, then, in the execution of that purpose slays the object of his evil design, he does thereby kill purposely and of his deliberate and premeditated malice and is guilty of murder in the first degree.

"Now, review the evidence fully and fairly. Determine whether or not the defendant did kill Catherine Reardon purposely and of his deliberate and premeditated malice. If you believe beyond a reasonable doubt that he did so, your verdict will be "guilty of murder in the first degree."

On appeal the United States Court of Appeals for the District of Columbia, in affirming the judgment of the trial court stated, *inter alia:*

With respect to the issue of deliberation the psychiatric testimony went no further than to say that appellant was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men. But it is obvious that brutal murders are not committed by normal people. To give an instruction like the above is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes (3)".

Footnote (3) The rule suggested by appellant would become a refuge for ill-tempered, irresponsible citizens; it would put a premium upon lack of self-control and would penalize the reasonable man, because of the restraint which he practices in his dealings with his fellows" *Hart* v. *United States*, 76 U. S. App. D. C. 193, 195, 130 F. 2d 456, 458 (1942).

As noted above petitioner filed his petition for rehearing calling attention of the Court to the point that it had confused the question of complete acquittal with the question of distinguishing the degree of crime between murder in the first degree and murder in the second degree and that the rule of law set up by the District Court and affirmed by the appellate court deprived petitioner of this right to have the jury consider the essential elements of his individual personality in the determination of the degree of his guilt. The petition was denied without an opinion.

Specification of Errors.

1. The Court of Appeals erred in holding that psycopathic aggressive tendencies, low emotional response and borderline mental deficiency insufficient to support a finding of not guilty by reason of insanity could not be considered by the jury in determining whether the accused is guilty of murder in the first degree or murder in the second degree under Act March 3, 1901, c. 854, *supra*.

2. The Court of Appeals erred in holding that the issues of deliberation and premeditation raised by an indictment for murder in the first degree should be determined by the standard of a reasonable man, instead of by the personality of the accused on trial.

Argument.

I

Mental disease or mental deficiency of the accused are relevant factors to be considered by the jury in determining whether the accused is guilty of murder in the first degree or murder in the second degree.

The fact that petitioner killed the deceased is not seriously disputed; the prime question arises on the degree of his guilt. The killing itself was particularly violent, but

the very violence itself and an utter lack of planning indicate it was an impulsive killing, and not done with deliberation and premeditation. Even the Government does not contend that petitioner developed an intent to kill until he went in the Library reading room and got the stick of firewood.

Congress established the distinction between murder in the first degree and murder in the second degree in the Act of March 3, 1901, *supra*. The distinction between the two rests on "deliberate and premeditated malice" which is a condition of murder in the first degree. Deliberation and premeditation are a condition of the mind of the accused which are not determined merely by the lapse of time.

> "It is not the lapse of time itself which constitutes deliberation, but the reflection and consideration, which takes place in the mind of the accused, concerning a design or purpose to kill. * * * Lapse of time is important because of the opportunity which it affords for deliberation." Per Miller, J. in Bostic v. U. S., 68 App. D. C. 167, 94 F 2d 636 (1937).

Since some minds function more rapidly than others, it becomes specially important to determine the mental condition of the accused at the time of the fatal act.

> *McAfee* v. *U. S.*, 72 App. D. C., 60, 66, 111 F. 2d 199 (1940).

> When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness, or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. Per Gray, J. in Hopt v. U. S., 104 U. S. 631, 634 (1882).

This is clearly recognized in the case of homicide committed while intoxicated both by the Court of Appeals (*Mc-*

Afee v. *U. S.*, *supra*) and by this Court (*Hopt* v. *U. S.*, *supra*) where a temporary stimulant obfuscates an ordinarily normal mind. The argument is stronger where the obfuscation is chronic and due to disease and congenital deficiency.

> "While the jury found that his condition in that respect (mental condition) was not such as to affect his mental capacity to relieve him from responsibility, yet it may have been such as to affect his mental capacity to cooly deliberate and premeditate on his acts. The jury, therefore, as hereinafter suggested, should have been instructed to consider all of the foregoing evidence in determining appellant's mental capacity to deliberate and premeditate the homicide. While one's mental condition may not excuse the act, it may nevertheless affect the degree of guilt." Per Frick, Jr. in State v. Anselmo, 46 Utah 137, 145, 148 P. 1071 (1915).

If intoxication voluntarily induced and carried to such a degree that the accused is incapable of deliberating can reduce the crime from murder in the first degree to murder in the second degree, it certainly would appear that disease and congenital defects which the accused can neither prevent nor cure should have under similar circumstances no less effect.

The effect of the charge of the trial court and the decision of the Court of Appeals was to deprive petitioner of all benefit of the evidence regarding his mental condition at the time of the crime. According to both courts petitioner was either wholly insane and therefore completely relieved of criminal responsibility, or else wholly normal and fully responsible. The assumption is contrary to the facts and common sense. The correct rule is stated in the charge of the trial court, approved by the Court of Errors and Appeals in *State* v. *Schilling*, 94 N. J. L. 145, 148, 112 A. 400 (1920):

> "* * * if at the time of doing the act the evidence shows you that this defendant was so feeble-

minded that his faculties were prostrated and rendered him incapable of forming a specific intent to kill with its deliberate and premeditated character, then, although it is no defense or justification, his offense would be murder in the second degree."

The point has not been expressly ruled on by this Court, and we submit that the interests of a just administration of the criminal law require that this Court hear and determine the issue.

II

The issues of deliberation and premeditation raised by an indictment for murder in the first degree should be determined not by the standard of a reasonable man, but by consideration of the personal traits and mental condition of the individual accused of the crime.

The Court of Appeals adopted the standard of a reasonable man because otherwise the jury might feel itself "at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes," and in support of its position cited *Hart* v. *U. S.*, 76 U. S. App. 193, 130 F. 2d 456 (R. 117).

The Court confused *provocation* to crime which may well be tested by the standard of a reasonable man, with the question of determining the degree of guilt, which is a totally different issue.

State v. *Anselmo, supra.*

The words of the statute "*of deliberate and premeditated malice*" are meaningless unless they refer to the mental condition of the accused himself. If the mental condition of the individual accused introduces a variable in the administration of the criminal law, it is a variable introduced by Act of Congress which the courts are not at liberty to disregard.

The charge of the trial court gave the jury no guidance on the question whether this particular accused had the power to deliberate and form a premeditated plan to kill the deceased. This omission is all the more pointed when one considers the detail with which the trial court discussed the degrees of crime and standards of guilt (R. 103-112). In short, the trial court substituted a normal, healthy mind for the diseased mentality and congenital defectiveness of petitioner. It submitted the case of "a reasonable man" to the jury but not that of this petitioner.

In its opinion the Court of Appeals, after summarizing some of the evidence, stated:

> "All this showed a persistent purpose in the execution of the crime during an appreciable time. The evidence was sufficient to permit the jury to find deliberation." (R. 116).

On the standard of a reasonable man, there is no disagreement. On the basis of this petitioner, a man of psycopathic aggressive tendencies, low emotional response and borderline mental deficiency, there is grave doubt. At all events, the proper administration of criminal justice, the correct interpretation of the Act of Congress March 3, 1901 above cited, required the issue to be submitted to the jury on the basis of the personal traits and characteristics of the accused himself, which was not done.

For these reasons it is respectfully submitted this Court should issue its writ of certiorari as prayed.

Respectfully submitted,

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APPENDIX

D. C. Code 1940, Title 22
Section 2401

Whoever being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in Section 22-401 or 22-402 of this Code, rape, mayhem, robbery, or kidnapping, or, in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon is guilty of murder in the first degree. (Act March 3, 1901, 31 Stat. 1321, c. 854, sec. 798; June 12, 1940, 54 Stat., ch. 339, sec. 1.)

D. C. Code 1940
Section 2402

Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree. (Act of March 3, 1901, 31 Stat. 1321, c. 854, sec. 799.)

Section 2403

Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree. (Act of March 3, 1901, 31 Stat. 1321, c. 854, Sec. 800; June 12, 1940, 54 Stat. ——, c. 339).

Section 2404

The punishment of murder in the first degree shall be death by electrocution. The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years. (Act of March 3, 1901, 31 Stat. 1321, c. 854, sec. 801; January 30, 1925, 43 Stat. 798, c. 115, sec. 1.)